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In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission and Swift Lumber Company, appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY and Fernwood, Columbia & Gulf Railroad Company.
No. 40.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal is from the final order or decree of the District Court (Tr. 180) which perpetually annulled and enjoined the order of the Interstate Commerce Commission entered in the proceeding styled *Swift Lumber Company* v. *Fernwood, Columbia & Gulf Railroad Co., et al*, 61 I. C. C. 485 (Tr. 157). The Commission filed a full report with a finding of facts.

The substance of the bill of complaint is that the order is not sustained by the report or the evidence and is inconsistent therewith.

In all of that territory extending south from the east and west line of the Alabama & Vicksburg Railway to the Gulf of Mexico and east of the Mississippi River for a distance of about 200 miles lies practically all of the yellow-pine production on the lines of the Illinois Central and the affiliated Yazoo & Mississippi Valley Companies. From all points in that territory, both on their main lines and on their branches, the Illinois Central and Yazoo & Mississippi Valley blanket their rates on yellow-pine lumber and its products to Ohio River crossings and points taking the same rates; to the territory beyond the Ohio River crossings, including eastern and Virginia cities; and to points in Kentucky and Tennessee on their own lines and on the lines of certain other carriers. Points on the main line and branch lines of the New Orleans Great Northern, which also operates in that territory, are similarly blanketed. (Tr. 147.)

Operating well within that territory is also the Fernwood, Columbia & Gulf (known in the record as Fernwood & Gulf), which is a single-track line of standard gauge, extending from a connection with the Illinois Central at Fernwood, Miss., eastwardly for 32 miles. Knoxo is 27 miles from Fernwood, and at Tylertown, a point 6 miles west of Knoxo, there is a connection with a branch of the New Orleans Great Northern. Fernwood and Tylertown were the only junction points with the other carriers at the time of

the hearing, but at the time the Commission filed its report the line had been extended 12 miles eastwardly through Foxworth, Miss., where it connects with the New Orleans Great Northern to a connection with the Gulf & Ship Island at Columbia, Miss. (Tr. 146.)

Swift Lumber Company, complainant before the Commission, was engaged in the manufacture of lumber and lumber products at Knoxo, Miss., and shipped its products over the Fernwood & Gulf to various interstate destinations reached by the above-mentioned trunk-line connections of that carrier.

The following findings clearly set forth the basis of the complaint, viz (Tr. 146):

> Prior to 1908 the only trunk-line connection of the Fernwood & Gulf was the Illinois Central, and prior to May 21, 1906, lumber rates from all points on its line to all destinations were made by combining its full local rates to Fernwood with the rates beyond. Effective on that date, rates were published from local points which were 2 cents higher than the rates from Fernwood, and this is the present basis for joint rates to Ohio River crossings and points beyond. To Memphis, Tenn., New Orleans, La., and some other points south of the Ohio River this arbitrary has been increased to 2.5 cents in accordance with General Order No. 28 of the Director General of Railroads. To certain points in Tennessee there are no joint rates from Knoxo, and the applicable combination rates, based on Fernwood, exceed the junction-

point rates by more than 2.5 cents. Rates from Fernwood and Tylertown via the Fernwood & Gulf do not exceed the respective rates from those points by way of the Illinois Central or the New Orleans Great Northern. The arbitraries over the junction-point rates accrue to the Fernwood & Gulf and in addition it receives a division of 2 cents per 100 pounds out of the joint rates.

It had not been the practice of the trunk lines to extend the junction-point, or blanket, basis of rates on lumber to points on short-line railroads in this territory (Tr. 146), and the general, although not the universal, practice throughout the Southwest had been to make rates from local points on independent short lines by adding an arbitrary to the rates from the junction point. However, in the *Tap Line Cases*, 234 U. S. 1, and *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, the trunk lines had blanketed the rates with divisions to the short lines in Arkansas, Missouri, Louisiana, and Texas.

In *McGowan-Foshee Lumber Company* v. *F., A. & G. R. R. Co. et al.*, 43 I. C. C. 581; 51 I. C. C. 317, the Commission fixed reasonable divisions to the short-line points of joint rates prescribed on yellow-pine lumber, in carloads, from Falco, Ala., to destinations on and north of the Ohio River and to points on the Louisville & Nashville in Tennessee and Kentucky at 3 cents per 100 pounds and, while not eliminating the arbitrary entirely, the carriers were required to apply the blanket basis from Falco (51 I. C. C. 317, 318). The Louisville & Nashville Railroad Company,

the most formidable of all challengers of orders of the Commission, not only did not attack the order in that case but it never raised preliminary objections to the tentative report of the Examiner which was made the final report of the Commission (51 I. C. C. 322). In the instant case, the Commission, by its order, simply ordered for the shippers on the short lines what had long existed in the territory to the west.

The order of the Commission (Tr. 157) directs the carriers—

> to cease and desist on or before August 5, 1921, and thereafter to abstain from publishing, demanding, and collecting any rates for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the Ohio River crossings, to destinations in Wisconsin, Minnesota, Iowa, and Missouri, to destinations in central and eastern trunk line territories, and to destinations in Tennessee and Kentucky, the rates to which are blanketed from yellow-pine producing points on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Miss., in excess of the rates contemporaneously published, demanded, or collected by them for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

The carriers were further directed (Tr. 158)—

> to maintain and apply to the transportation of yellow-pine lumber, timber, and

lumber products, in carloads, from Knoxo, Miss., to the destinations described in the next preceding paragraph, rates not in excess of the rates contemporaneously maintained and applied by them to the transportation of yellow-pine lumber, timber, lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

ARGUMENT.

I.

THE FACTS BEFORE THE COMMISSION AMPLY SUSTAIN THE FINDING THAT SHIPPERS AT KNOXO ON THE LINE OF THE FERNWOOD & GULF WERE SUBJECTED TO UNDUE PREJUDICE IN VIOLATION OF SECTION 3.

Section 3 provides (24 Stat. 379, 380):

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15 as amended provides (36 Stat. 539, 551):

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, * * * (*either in extension of any pending complaint or without any complaint whatever*), the Commission shall be of opinion that any individual or joint rates

> * * * regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * *unduly preferential or prejudicial* or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation *to the extent to which* the Commission finds the same to exist, * * *. (Italics ours.)

The Commission itself very clearly stated the precise question raised and decided; thus (Tr. 149):

> The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers, and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefit to these other short-line points and specifically, in this case, to Knoxo on the line of the Fernwood & Gulf.

The facts which establish undue prejudice to shippers at Knoxo on the line of the Fernwood & Gulf are equally clearly stated; thus (Tr. 148, 150):

> The Fernwood & Gulf is well within this blanket territory and nearer to the northern boundary than to the southern. The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of New Orleans on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch, but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the main line of the former road at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distances to Memphis, Tenn., through which point most of the traffic with which we are here concerned moves, are 115 miles greater via Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown and 96 miles greater by

way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory.

* * * * *

We find nothing of record in this case which warrants a deviation from the conclusions reached in *McGowan-Foshee Lumber Co.* v. *F., A. & G. R. R. Co., supra*. We do not find that the rates on yellow-pine lumber, timber, and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable, except that we find that the rates to points in Tennessee, which were made by combination of the local rates to and beyond Fernwood, were unreasonable to the extent that they exceeded the corresponding contemporaneous rates from Fernwood to the same destinations by more than 2.5 cents per 100 pounds. We do find, however, that subsequent to January 1, 1919, the rates on yellow-pine lumber, timber, and lumber products from Knoxo to Ohio River crossings. to points in Wisconsin, Minnesota, Iowa, and Missouri, to points in central and eastern trunk line territories, and to points in Tennessee and Kentucky the rates to which are blanketed from points producing yellow pine on the Illinois Central and New Orleans Great Northern Railroads south of Jackson, Miss., were, and for the future they will be, unduly prejudicial to complainant to the

extent that they exceed the blanket basis of rates from Fernwood, Tylertown, and Foxworth.

In *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, 62, commonly known as the *Richmond Switching Case*, the order of the Commission was sustained as within its authority under section 2, which was primarily directed against discrimination between shippers located in the same community. The carriers argued that the discrimination was justified because of the competition among the carriers. In rejecting the argument and sustaining the order, this Court, speaking by Mr. Justice Day, said:

> We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.
>
> Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions

> can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

In *Houston & Texas Railway Co.* v. *United States*, 234 U. S. 342, 356, this Court, speaking by Mr. Justice Hughes, said:

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (See also *Sou. Ry. Co.* v. *United States*, 204 Fed. 465; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 118 Fed. 163.)

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates.

Section 3 forbids discrimination of any kind whatsoever.

In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 220, this Court said:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Com-

> mission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

What is undue or unreasonable preference or advantage is a question not of law but of fact. (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Texas & Pacific Ry. Co.* v. *United States*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.)

The determination of this question of fact is for the Commission, and its findings are conclusive. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320, this Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Central R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts,

> disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., etc., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving the purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, 302, this Court, speaking by Mr. Justice Pitney, said:

> Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates as methods of competition.

Concerning itself, the Fernwood & Gulf avers "that it is an independently owned and operated line, not affiliated with, controlled by, or dictated to by any of its connections." It further avers that "under the act to regulate commerce and the Fifth Amendment and the Federal Constitution its individualization can not be merged into a policy by connecting carriers whose interests are adverse and whose policies are constructed for their own conservation, even though in so being they involved the disorganization and destruction of the Fernwood Company." (Tr. 10, 11.)

As justification for extending the junction-point rates to points on the Mississippi Central Railroad and participating in through rates on lumber originating on certain small railroads, including the Alabama & Mississippi, the Mississippi & Western Railroad, the Cybur & Northern Railroad, and the Pearl River Valley Railroad, the Illinois Central avers "that all of the testimony offered in this case clearly indicates that the conditions surrounding the making of rates to points on the Mississippi Central Railroad are entirely different from those that attend the making of rates from Knoxo, the point involved in this case, and that the Illinois Central Railroad in extending junction-point rates on the Mississippi Central acted under the force of compelling competition, and could not therefore be guilty of discrimination, and that this action can not constitute discrimination as against Knoxo. So far as the other short-line railroads mentioned in the commission's decision are

concerned, no one of them is a connection of the Illinois Central or of the Fernwood, Columbia & Gulf Railroad and these complainants can not therefore in any sense be responsible for rates which prevail on those roads." (Tr. 14.)

Referring to the latter roads the Commission found (Tr. 147):

> It is to be observed that none of these roads connects with either the Illinois Central or the New Orleans Great Northern, yet both these defendants concur in joint rates on the blanket basis from local points on these short lines. It appears, however, that if the Illinois Central and the New Orleans Great Northern should refuse to concur in these joint rates, similar rates would still apply to most destinations via other routes.

On the subject of competition the Commission said (Tr. 149, 150):

> Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.
>
> If neither cost of service nor competition justifies the discrimination, what circumstances are there surrounding points located, like Knoxo, on independent short lines which make it reasonable that they should be excluded from the benefits of the blanket system? * * * Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary

> consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points.

Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340, has no application. In that case this Court, speaking by Mr. Justice McReynolds, said:

> Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself *or in relation to others;* * * *.

Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247, is against the appellees. In that case this Court, speaking by Mr. Justice Brandeis, said (p. 256):

> But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, * * *.

Appellees allege and argue that the rates found by the Commission as unduly prejudicial are justified.

Appellees not only do not disclaim any responsibility, but they stoutly defend all that has been found against them.

On the power of the Commission to remove discrimination and undue prejudice, in the *Central Railroad Company of New Jersey Case, supra*, the court further said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Sec. 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18.

II.

THE IMPAIRED FINANCIAL CONDITION OF THE FERNWOOD & GULF SHOULD NOT RENDER VOID THE ORDER OF THE COMMISSION.

It is no answer on the part of appellees that the Fernwood & Gulf was once a tap line (Tr. 146); that independent short lines are likely to be abandoned with the depletion of the timber areas; that the short lines do not furnish their commensurate quota of equipment (Tr. 150), and other arguments along the same line. The Illinois Central Railroad Company and the Fernwood, Columbia & Gulf Railroad Company, joint complainants in the bill, and appellees here, allege that they sue "on behalf of themselves and of other carriers affected by the order hereinafter complained of" (Tr. 1).

The District Court filed no opinion, but if in entering its decrees it was influenced by the finding of the Commission that (Tr. 148)—

> The Fernwood & Gulf shows that it has operated at a loss, and that the loss would be greater if its revenue on lumber were reduced by the amount of the arbitrary, since lumber supplies 93 per cent of its total traffic,

that Court committed error for two main reasons.

(1) In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144, 145, this Court, speaking by Mr. Justice Brandeis, said:

> Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly

> framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

The order did not direct the carriers to reduce rates and they were authorized by an order drawn in the alternative to remove the discrimination "by raising the lower rate or by lowering the higher rate or by doing both."

(2) Fernwood & Gulf has placed its case on a further contention which is "transparently unsound." It avers (Tr. 9, 10):

> A fully equipped railroad built on a circle with a radius of 100 miles from the North Pole would be, at the present day, utterly valueless; there would be no traffic. And differing only in degree will be the railroad of the Fernwood Company, running into a logged-off barren, where there will be nothing for it to haul and no use to which it could be put. The Fernwood Company avers that the failure to provide against the loss incident to depreciation, depletion, and obsolescence has been the undoing of more enterprises than any other single cause, and that under the Constitution a carrier, circumstanced as it is, has a right to exact, under the fifth amendment, a capital return reserve to be imposed against each tim-

> ber unit removed from the tributary territory. And complainants aver that said commission, when they failed to give effect to this right, thus vouchsafed under the Constitution, exceeded the statutory powers, invaded the constitutional rights, and the order made therefor was void.

In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 142, this Court, speaking by Mr. Justice Brandeis, said:

> *First.* The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce.
>
> * * * * *
>
> The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

In *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412, this Court said:

> It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible

without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

In *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596, this Court said:

> * * * we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It can not be said that a corporation is entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged

> here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and consequently a diminution in the tolls collected, that is not in itself a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549, this Court said:

> Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not

sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates can not be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article over a particular road to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

CONCLUSION.

Annexing to the bill of complaint (Tr. 6) a copy of the report of the Commission as Exhibit I (Tr. 145), complainants assail the validity of the order as not sustained by the facts.

The United States filed a motion to dismiss, setting forth, among other grounds, that the bill of complaint is without equity on its face. (Tr. 163.) The District Court entered an order granting the pre-

liminary injunction (Tr. 167), the United States elected to stand, and the order granting the preliminary injunction was made permanent by the final decree (Tr. 71, 80).

The judgment should be reversed and the cause remanded with directions to the District Court to sustain the motion to dismiss and to dismiss the bill of complaint for want of equity.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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